United States Court of Appeals

for the Second Circuit

INTERVENOR'S REPLY BRIEF

77-7237

77-7249

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

B

BRITISH AIRWAYS BOARD and
COMPAGNIE NATIONALE AIR FRANCE,
Plaintiffs-Appellees,

V.

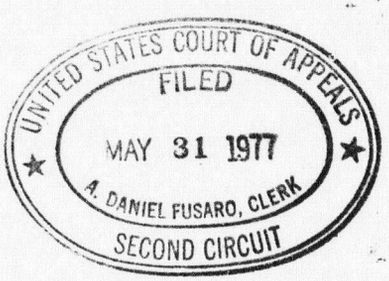
THE PORT AUTHORITY OF NEW YORK AND
NEW JERSEY, AND WILLIAM J. RONAN, W.
PAUL STILLMAN, JAMES G. HELLMUTH,
VICTOR R. YANITELLI, MILTON A. GILBERT,
HOWARD SCHULMAN, ROBERT F. WAGNER,
JAMES C. KELLOGG, III, LEWIS L. GLUCKSMAN,
JOSEPH F. CULLMAN, III, ALAN SAGNER,
Defendants-Appellants

and

TOWN OF HEMPSTEAD, INCORPORATED,
VILLAGE OF LAWRENCE, INCORPORATED
VILLAGE OF CEDARHURST, INCORPORATED
VILLAGE OF ATLANTIC BEACH, AND
ROBERT F. CHECK, MONA GOTTESMAN, AND
HERBERT WARSHAVSKY,
Applicants for Intervention-Appellants.

On Appeal From Order of United States District Court
for the Southern District of New York,
Judge Milton Pollack,
Denying Appellants' Motion to Intervene

REPLY BRIEF OF APPLICANTS FOR INTERVENTION-APPELLANTS



WILLIAM D. DENSON
551 Fifth Avenue
New York, New York 10017
212 687-1360
COUNSEL FOR APPLICANTS FOR
INTERVENTION-APPELLANTS

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRITISH AIRWAYS BOARD AND COMPAGNIE NATIONALE AIR FRANCE,	:	
Plaintiffs-Appellees,	:	
v.	:	Docket Nos.
THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY, AND WILLIAM J. RONAN, W. PAUL STILLMAN, JAMES G. HELLMUTH, VICTOR R. YANITELLI, MILTON A. GILBERT, HOWARD SCHULMAN, ROBERT F. WAGNER, JAMES C. KELLOGG,III, LEWIS L. GLUCKSMAN, JOSEPH F. CULLMAN,III, ALAN SAGNER,	:	77-7237 77-7249
Defendants-Appellants	:	
and	:	
TOWN OF HEMPSTEAD, INCORPORATED, VILLAGE OF LAWRENCE, INCORPORATED VILLAGE OF CEDARHURST, INCORPORATED VILLAGE OF ATLANTIC BEACH, AND ROBERT F. CHECK, MONA GOTTESMAN, AND HERBERT WARSHAVSKY,	:	
Applicants for Intervention-Appellants.	:	

REPLY BRIEF OF APPLICANTS
FOR INTERVENTION-APPELLANTS

The affirmance of the order of the District Court denying the motion to intervene as a party defendant dated May 20,1977, is urged on the ground that "no circumstances have changed and no new arguments have been raised".

This is not correct.

I.

The decision of the District Court of May 11, 1977, for the first time, broadened the issues to include the determination of whether the conduct of test operations of the Concorde at JFK are unqualifiedly valid because of the general authority of 49 USC 1353(b). Coxsey v. Hallaby 334 F2d 286,287 (10 Cir.1964). For the first time, on May 11, 1977, and only because of the Court's opinion, did the conduct of these test operations of the Concorde appear in the record. Prior to that time both the District Court and the parties studiously avoided raising the issues of the irreparable injury and damage to the Town of Hempstead, et al. proximately resulting from the authorized test operations.

This is a new ground injected into this litigation by the District Court decision on which a judgment was not entered until May 20, 1977. The motion to intervene,raising the constitutional defenses set forth therein was timely.

The motion could not have been asserted until the Port Authority declined to assert said constitutional defenses (47a par. 13) which was subsequent to May 11, 1977, the date of the decision and prior to May 20, 1977, the date of the entry of judgment.

Indeed, the motion for relief pursuant to Rule 59, need not be filed until ten days after the entry of the judgment, except that the Port Authority was filing its Notice of Appeal the same day, May 20, 1977, and the motion to intervene was properly made before said Notice of Appeal was filed (88a). Not only that but counsel for all the parties were tendered the motion papers in the courtroom at the time the motion was noted by the Court. It is thus apparent that no prejudice of any kind has been sustained by the parties resulting from the procedure followed by the Town of Hempstead, et al., in bringing the motion to intervene to the attention of the Court.

Thus the record clearly reveals that there are new issues presented by the motion to intervene made on May 20, 1977, and it is equally clear that the motion to intervene was timely made by the Town of Hempstead, et al.

II.

Since the Port Authority either cannot or will not present these constitutional issues, the judicially determined interests of the Town of Hempstead, et al., are without any representation in this proceeding. "Good Cause" exists for allowing the Town of Hempstead, et al. to assert these con-

stitutional defenses which they, as individuals, are entitled to assert.

The failure of the Port Authority to assert the true nature of the impact of the test operations of the Concorde on the applicants for intervention is attributable to their desire to protect themselves from future liability to applicants arising from their operation of JFK as airport proprietors under Griggs v. Allegheny County 369 U.S. 84 (1962). This antagonistic attitude of the Port Authority, the judicially designated lawyer, protector and advocate would seem to disqualify it from its role as legal representative of the Town of Hempstead, et al., and constitute "good cause" for permitting the intervention as parties defendant.

The airlines have failed to explain the erroneous conduct of the District Court in granting a motion for summary judgment where it appears that the record of the proceeding was illegally limited so as to exclude matters which implicitly involved issues of material fact. This error also deprived the Town of Hempstead, et al. of their rights to due process under the Fifth Amendment to the Constitution.

The Town of Hempstead, et al., have a judicially determined stake in the outcome of this litigation. No one of the parties is protecting that interest. That interest should be protected and, at this stage, only this Court has the power to correct the manifest injustice that has arisen from the denial of the right of these applicants to be heard and to defend that interest - Ford Motor Co. v. Bisanz Bros. Inc. 249 F2d 22, 28 (8 Cir.1957) and New York Pub. Int. et al. v. Regents of N.Y.U. 516 F2d 350, 352 (2Cir.1975)

CONCLUSION

The Order of the District Court denying intervention should be reversed and the case remanded to the District Court permitting the filing of the motion under Rule 59 FRCP to vacate the judgment of May 20, 1977 and to hold an evidentiary hearing on the constitutional issues presented.

Respectfully submitted,

William D. Denson

WILLIAM D. DENSON
551 Fifth Avenue
New York, New York 10017
(212)687-1360
Counsel for Applicants for
Intervention-Appellants

Dated: May 31, 1977